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No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1983

In Re WALTER POLOVCHAK
(STATE OF ILLINOIS,

Petitioner,

vs.

MICHAEL POLOVCHAK and ANNA POLOVCHAK,
Respondents.)

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED

1.

Whether a child may be placed under state control, possibly until he becomes an adult, without any finding that such control is necessary for his welfare or protection?

2.

Whether a sixteen year old boy who is lawfully in the United States and wishes to remain in this country should be forcibly returned to the Soviet Union?

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PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Supreme Court which was entered on May 27, 1983.

OPINION BELOW

The opinion of the Illinois Supreme Court is reported as *In re Polovchak,* 97 Ill. 2d 212, 454 N.E.2d 258 (1983). That opinion is reproduced as Appendix A of this Petition. The order of the Illinois Supreme Court denying a petition for rehearing is reproduced as Appendix B of this Petition.

JURISDICTION

The opinion and judgment of the Illinois Supreme Court was entered on May 27, 1983. The State of Illinois filed a timely Petition for a Rehearing, which was denied on September 30, 1983. This Petition for a Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTION PROVISION AT ISSUE

FOURTEENTH AMENDMENT, (Due Process and Equal Protection Clauses):

. . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Walter Polovchak is a sixteen year old boy who wants to remain in the United States. His parents want him to be forcibly deported to the Soviet Union. The State of Illinois has been cooperating with Walter and his attorneys in the Illinois courts in an effort to keep him from being forcibly deported.

The Illinois Supreme Court has held that under the applicable statute Walter was not subject to Juvenile Court jurisdiction. That interpretation of a state statute is not challenged in this Petition. However the Illinois Supreme Court remanded the matter to the Juvenile Court with directions to retain control over Walter, possibly until he becomes an adult. Since there was no finding that such control is necessary for Walter's protection or welfare, the remand is challenged in this Petition as a denial of due process.

Walter Polovchak was born in the Ukrainian Soviet Socialist Republic on October 3, 1967. In January, 1980, Walter and his family emigrated to Chicago. (Tr. 185) Walter's family included his father Michael Polovchak, his mother Anna Polovchak, his sister Natalie (then age 17) and his brother Michael (then age 5). The family lived with relatives in Chicago, eventually moving in with Walter Polovczak (cousin Walter), the 24 year old son of Mr. Polovchak's sister.

Mr. Michael Polovchak, however, changed his mind about living in the United States and decided to return to the Soviet Union. In the spring of 1980 he applied for permission to return to the Ukraine. (Tr. 186-187) The decision caused an intense conflict within the Polovchak family which lasted for several months.

Walter and Natalie decided that they wanted to remain in the United States. The parents violently objected to Walter's decision. It is undisputed that Mr. Polovchak threatened to kill cousin Walter and Natalie if they interfered with Walter. (Tr. 137, 148) There was testimony that Mr. Polovchak said that if anyone tried to interfere with Walter "blood will run." Walter testified that his father told him that the police in America could be bribed, and that he would pay off the police to tie Walter up and put him on a plane to the Soviet Union. (Tr. 173, 209)

Meanwhile, cousin Walter, after arguments with Mr. Polovchak, had moved into another apartment. (Tr. 188) Natalie decided that she could not stand it any more, and that she was going to move out. (Tr. 151) Walter told her that he wanted to move out too, but Natalie told him that he could not go with her. (Tr. 154) But Walter

told Natalie that unless he could go with her he would run away by himself. (Tr. 151, 154)

On July 13, 1980, Walter and Natalie left home to go to church, but did not return. (Tr. 110-112) Instead they went to live with their cousin Walter, where they stayed until their parents sent the police to find them.

At first, the parents had no idea where Walter was staying. Walter did return home once with some friends to get his belongings, but he refused to tell his mother where he was going to live. (Tr. 112-117, 164) But on July 18, Mr. Polovchak obtained a possible phone number for Walter, and took it to Sergeant Leo Rojek of the Chicago Police Department. (Tr. 216) Sergeant Rojek traced the number and found Walter. (Tr. 216-218)

Walter refused to return to the home of his parents, so Sergeant Rojek filed a petition alleging that Walter was a minor in need of supervision. (MINS). The MINS provisions of the Illinois Juvenile Court Act, which have since been repealed, stated that the court could intervene when a minor was beyond the control of his parents. Ill. Rev. Stat. 1979, Ch. 37, sec. 702-3 (repealed).

After a hearing in Juvenile Court, Walter was placed in the temporary custody of the Department of Children and Family Services. (Tr. 52) Later Walter entered an admission to the allegation that he was a minor in need of supervision, and a hearing was held to determine if there was a factual basis for that plea. (Tr. 81-85) At that hearing Walter testified that he would have left home whether there had been a place for him to stay or not, and that he would refuse to return home if the case was dismissed. (Tr. 169-176) Later the judge was informed by Walter's social worker that Walter had repeatedly

threatened to kill himself if forced to return home. (Tr. 335-336)

The judge found Walter to be a minor in need of supervision, and set the matter for a dispositional hearing. (Tr. 235) At the dispositional hearing it would be decided whether Walter would be returned to his parents or not. But the parents prevented a dispositional hearing from being held by taking an interlocutory appeal from the order finding Walter to be a minor in need of supervision. (Sup. Tr. 2-16) While that appeal was pending the parents returned to the Soviet Union without Walter. In the meantime Walter had been granted political asylum by the federal government.

The Appellate Court of Illinois reversed the finding of the Juvenile Court without any remand. *In the Interest of Polovchak,* 104 Ill. App. 3d 203, 432 N.E.2d 873 (1st Dist. 1981). The Illinois Supreme Court granted leave to appeal, and ruled that the Juvenile Court had erred in taking jurisdiction over Walter. (Appendix A) However, the Illinois Supreme Court remanded the matter to the Juvenile Court with directions to retain jurisdiction over Walter until one of his parents returned to the United States. If neither of the parents were to return, the Juvenile Court is to retain control over Walter for an indefinite period of time. (Appendix A, p. 13a)

REASONS FOR GRANTING THE WRIT

I.

IT IS A VIOLATION OF WALTER POLOVCHAK'S RIGHT TO DUE PROCESS AND FAMILIAL PRIVACY TO PLACE HIM IN THE CONTROL AND CUSTODY OF THE JUVENILE COURT, POSSIBLY UNTIL HE BECOMES AN ADULT, WITHOUT ANY FINDING THAT SUCH CUSTODY IS NECESSARY FOR HIS WELFARE OR PROTECTION.

The Illinois Supreme Court ruled that Walter Polovchak was not a minor in need of supervision and therefore was not subject to Juvenile Court jurisdiction. This interpretation of a state statute by the highest court of Illinois is not challenged in this Petition. Ill. Rev. Stat. 1979, Ch. 37, sec. 702-3 (repealed); *Agins* v. *City of Tiburon*, 447 U.S. 255, 259 fn. 6 (1980). However the Illinois Supreme Court then contradicted itself and remanded the case to the Juvenile Court with directions to maintain control and custody over Walter for an indefinite period of time. The remand with directions violated Walter's rights under the United States Constitution in at least two ways:

1. It violates Walter's right to due process of law in that it permits him to be placed in state custody for an indefinite period of time without any finding that such custody is necessary to Walter's welfare or protection.

2. It violates Walter's right to familial privacy in that it permits state intervention in the affairs of Walter's family without any finding that there is any state interest justifying such intervention.

These issues, particularly that involving familial privacy, present novel and important questions which should be decided by this Court. As yet this Court had not fully defined the extent of a minor's right to due process in custody proceedings or the extent of a minor's right to familial privacy.

Due Process

The remand of the Illinois Supreme Court could result in Walter being placed in state custody until he becomes an adult. The specific terms of the remand are as follows:

> . . . we believe the appropriate disposition of this case is to remand it to the circuit court of Cook County with directions that it retain jurisdiction of Walter and this cause pending the return of Walter's parents, or either of them, to this country, in which event Walter's custody shall be given to the returning parent. In the event that neither Michael nor Anna Polovchak shall return, the circuit court shall proceed in the manner it deems best suited to Walter's needs. (Appendix A, p. 13a)

There is no statute, rule or precedent giving an Illinois Juvenile Court the right to exercise control over a minor in a situation like this, where the finding of the Juvenile Court had been reversed because of insufficient evidence. Therefore the short paragraph just quoted provides the only guidance to the Cook County Juvenile Court concerning what it should do with Walter.

Therefore Walter could be placed in the custody of any agency or person for an indefinite period of time. For example, Walter could be kept in the custody of the Illinois Department of Children and Family Services, which would have discretion to place him in any institution or

foster home. There is no finding that such custody is necessary for Walter's welfare or protection. There is no time limitation, except that Juvenile Court control over Walter is to last until one of his parents returns to this country or until he becomes an adult. There is no limit on the discretion of the Juvenile Court, except that it ". . . shall proceed in the manner it deems best suited to Walter's needs." (Appendix A, p. 13a) There is not even any requirement that the Juvenile Court conduct a hearing. There is no indication that Walter or his attorneys will have any say about what happens to him.

There could hardly be a more clear violation of due process than to place a person in custody without a hearing, according to no legal standard, and without any finding that such custody is necessary for any purpose. This Court should accept jurisdiction so that Walter and other minors will not be arbitrarily placed in foster homes or institutions by a state.

It is true that the Juvenile Court of Cook County originally found, under a provision which has since been repealed, that Walter was a minor in need of supervision. (Tr. 235) Ill. Rev. Stat. 1979, Ch. 37, sec. 702-3 (repealed). It is also true that the Juvenile Court found that it was a matter of immediate and urgent necessity that Walter be placed in the custody of the Department of Children and Family Services. (Tr. 11, 52) But the Illinois Supreme Court reversed both findings, ruling that they were not supported by the evidence. (Appendix A, pp. 9a-12a) Thus as of now the only judicial findings ever made concerning Walter have been vacated on appeal. Since the Illinois Supreme Court vacated the findings of the Juvenile Court, and made

no new findings of its own, there is nothing to justify holding Walter in custody.

Nor can the fact that Walter is sixteen years old, and that his parents have returned to the Soviet Union without him, justify subjecting Walter to the control of the Juvenile Court. It is well established that constitutional rights are not reserved exclusively for adults, but apply to minors as well. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976); *In re Winship*, 397 U.S. 358 (1970); *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *In re Gault*, 387 U.S. 1 (1967). Therefore the absence of Walter's parents could not justify placing him under the control of the Juvenile Court unless there was a finding that Walter could not take care of himself and that there was no relative or friend who could take care of him. No such finding exists. In fact the record indicates that Walter has a cousin in Chicago, an aunt and uncle in Chicago, and an aunt in Santa Barbara who are willing and anxious to provide him with a home. (Tr. 111-112, 211-212, 339-340) Since there is no finding that state custody over Water is necessary for his welfare or protection, the remand subjecting him to the control of the Juvenile Court is unconstitutional.

There are, of course, numerous precedents indicating that a person may not be placed under state custody or control without a finding that such custody or control is necessary for the protection of that person or of others. *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245 (1972); *Jackson* v. *Indiana*, 406 U.S. 715 (1972). In Walter's case there had been no hearing and no finding

that Juvenile Court control over Walter is necessary for his protection. As this Court said in *O'Connor*:

> In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. 422 U.S. at 576.

The record here indicates that Walter is fully capable of taking care of himself with the help of his relatives. But the terms of the Illinois Supreme Court's remand dismiss such considerations as irrelevant. The remand gives no weight to the desires of Walter and his attorneys. Therefore the order that the Juvenile Court take control over Walter for an indefinite period violates due process of law.

In addition, a person who has committed no crime may be placed in state custody only if there is a valid state interest outweighing the person's liberty interests. *Youngblood* v. *Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 2461 (1982). There has been no finding here (except those reversed on appeal) that there is any state interest in Juvenile Court control over Walter.

Thus the Illinois Supreme Court has ordered that the Juvenile Court assume control and custody over Walter even though there has been no finding that such control is necessary for Walter's protection or for any other purpose. This Court should accept jurisdiction in order to correct this clear violation of due process of law.

Familial Privacy

The remand of the Illinois Supreme Court permits the Juvenile Court to place Walter in the custody of

any agency or person for an indefinite period of time. The consent of Walter or his parents is not required. Therefore the terms of the remand violate Walter's right to familial privacy.

Over the last two decades this Court had handed down a line of cases limiting intervention in family affairs. In many areas this right to familial privacy has not been clearly defined. But the basic principle seems to be that any intervention in family matters must be justified by some compelling state interest. Since there has been no finding that any state interest will be served by subjecting Walter to the control and custody of the Juvenile Court, the terms of the remand violate Walter's right to familial privacy.

The right to familial privacy was first stated in cases dealing with birth control and abortion. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Roe* v. *Wade*, 410 U.S. 113 (1973). This Court held that various constitutional guarantees create a zone of privacy surrounding marital and family matters. This zone of privacy, this Court stated, may be overcome only by a compelling state interest.

The right to familial privacy was extended to matters relating to child custody and care. *Santosky* v. *Kramer*, 455 U.S. 745 (1982); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Stanley* v. *Illinois*, 405 U.S. 645 (1972). *Santosky*, *Yoder* and *Stanley* each involved a different factual situation, but the reasoning used by this Court in each case was similar. In each case it was held that any intervention in family affairs must be subjected to a balancing test in which the state interest in the care and protection of children must be weighed against the

right of familial privacy. In the absence of an overriding state interest, governmental intervention in family affairs is forbidden.

In the cases just cited the right to familial privacy was asserted by parents or potential parents. However, this Court had held that the right to familial privacy may be asserted by a minor as well as an adult. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976). In fact, in *Planned Parenthood* v. *Danforth*, this Court held that in some circumstances the right to familial privacy may operate in favor of a child and against parents. In that case it was held that a parent could not be given an absolute veto over the right of a minor girl to seek an abortion. This Court said:

> Constitutional rights do not mature and come into being magically when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. 428 at 74.

Therefore a minor may assert the right to familial privacy even against a parent.

This is in accord with the statement of this Court in *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977). In *Moore*, it was stated that familial privacy extended not only to the nuclear family, but also to other family relationships, such as those involving uncles, aunts, cousins and grandparents. Therefore family members other than parents can assert a right to familial privacy. In addition, familial privacy applies to any decision by Walter to live with his cousin, uncle or aunts.

The remand of the Illinois Supreme Court allows the Juvenile Court to place Walter in the custody of

any agency or person. There is no finding that there is any compelling state interest that would override Walter's constitutional right to familial privacy. Also, there is no finding or indication that Walter is unable to care for himself with the help of his relatives. Therefore this Court should accept jurisdiction in order to reverse the invasion of Walter's right to familial privacy.

Equal Protection

The terms of the Illinois Supreme Court's remand in this case also raise serious problems of equal protection. Currently in Illinois there is no legal requirement that a minor remain in the home of his parents. The police are specifically forbidden from returning a runaway minor to his home unless the minor consents. Ill. Rev. Stat. 1983, Ch. 37, secs. 703-1.1(c), 703-1.1(d). The Juvenile Court may not act when a minor leaves home unless three weeks have passed and the family has first been referred to a crisis intervention center. Ill. Rev. Stat. 1983, Ch. 37, sec. 702-3.

The Illinois Supreme Court has ordered that Walter be placed under the control of the Juvenile Court until one of his parents returns to the United States, and that then Walter must be placed in the custody of that parent, (Appendix A, p. 13a) Thus Walter is being treated differently from every other child in Illinois who has run away from home or who wants to live apart from his parents. Equal protection requires that persons similarly situated be treated in a similar fashion. *Plyler* v. *Doe,* 457 U.S. 202 (1982). Therefore the terms of the remand in this case violate Walter's right to equal protection of law.

Standing

The State of Illinois has filed this Petition because it has been a party to this case from the start and has a duty under both statute and case law to try to protect Walter's rights. Under the Illinois Juvenile Court Act the State is a party to all Juvenile Court proceedings. Ill. Rev. Stat. 1981, Ch. 37, sec. 701-21. Accordingly, the State played a leading part in every hearing in the Cook County Juvenile Court, filed a brief as a party in the Appellate Court of Illinois, and filed a petition for leave to appeal, a brief, and a petition for rehearing in the Illinois Supreme Court. The statute making the State a party to all juvenile proceedings merely restates the traditional duty of a government to assert the rights of minors when the parents are unwilling or unable to do so. *Kent* v. *United States*, 383 U.S. 541, 554-555 (1966); *In re Jennings*, 68 Ill. 2d 125, 368 N.E.2d 864 (1977); *People* v. *Shoos*, 15 Ill. App. 3d 964, 305 N.E.2d 560 (1st Dist. 1973).

In addition, the State of Illinois has a specific interest in the outcome of this matter. At present the Illinois Department of Children and Family Services is the custodian of Walter. (Tr. 11, 52) The State has a strong interest in assuring that its custody of Walter is either continued or vacated in accordance with the provisions of the United States Constitution. As custodian of Walter for the last three years, the State of Illinois has an interest in the outcome of this case and standing to request that Walter's constitutional rights be observed.

In any event, Walter will file his own petition requesting a grant of certiorari. Walter's standing is undeniable.

Conclusion

The Illinois Supreme Court had ordered that Walter be placed under the control and custody of the Juvenile Court for an indefinite period although there had been no finding that such control and custody are necessary for Walter's protection or for any other purpose. Thus the remand with directions clearly violates Walter's right to due process of law.

Nevertheless there are novel and important constitutional issues presented by this case. This Court has not yet clearly defined the due process rights of minors in custody hearings, the extent of a minor's right to familial privacy, or the degree to which minors can assert constitutional rights against their parents. This Court should grant certiorari in order to correct the violation of Walter's due process rights and in order to deal with these important issues of constitutional law.

II.

THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO PREVENT THE FORCIBLE AND ILLEGAL REMOVAL OF WALTER POLOVCHAK FROM THE UNITED STATES.

The remand with directions of the Illinois Supreme Court could make it possible for Walter to be forcibly and illegally removed from the United States. If that were to happen neither this Court nor any other American court would have any power to protect his rights.

The Illinois Supreme Court has ordered that if either of Walter's parents return to this country, then Walter is to be placed in their custody. But if the parents were to regain custody, it is almost certain that they

would try to remove Walter from this country and take him to the Soviet Union. The Illinois Supreme Court has not provided any safeguards to prevent this.

The executive branch of the federal government has granted political asylum to Walter, and has issued a departure control order to prevent his removal from the United States. The validity of those orders is presently being litigated in the United States District Court for the Northern District of Illinois. *Polovchak* v. *Landon*, No. 80 C 5595. However, this Court need hardly be reminded that the United States does not have perfect control over its boarders. See *Plyler* v. *Doe*, 457 U.S. 202 (1982). If the parents had custody of Walter and the assistance of the Soviet government they might well be able to remove Walter from the United States.

Whatever may have been the case in 1980, it certainly would not be in Walter's interests now to be forcibly removed to the Soviet Union. If that were to happen it would be a permanent blot on the record of this country's judicial system. When this litigation began, Walter was living with his cousin and not with his parents. It was the parents who began state intervention by sending the police after Walter. This Court should grant certiorari in order to assure that Walter's future will be determined by law and not by force.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX A

May 27, 1983

Docket Nos. 56552, 56572

In re WALTER POLOVCHAK, Appellee and Appellant

(The People of the State of Illinois, Appellant and Appellee).

JUSTICE UNDERWOOD delivered the opinion of the court:

On July 19, 1980, pursuant to a petition for adjudication of wardship, the circuit court of Cook County appointed a guardian *ad litem* for 12-year-old Walter Polovchak, and, over the objection of Walter's parents, Michael and Anna Polovchak (the Polovchaks) placed the boy in the temporary custody of the Illinois Department of Children and Family Services (DCFS). Walter was subsequently found to be a minor in need of supervision and adjudged a ward of the court under the Juvenile Court Act (Ill. Rev. Stat. 1979, ch. 37, pars. 702—3(a), 704—8). Temporary custody remained in DCFS with supervised visits arranged between Walter and his parents. Prior to the dispositional hearing, Michael and Anna Polovchak filed an interlocutory appeal pursuant to Rule 662 (73 Ill. 2d R. 662). A divided appellate court reversed (104 Ill. App. 3d 203), and we allowed the petitions of both the State and Walter for leave to appeal.

Michael and Anna Polovchak, and their three children, Natalie, age 17, Walter, and Michael, age 5, arrived in the United States from their homeland, the Ukrainian Soviet Socialist Republic, in January 1980. The family spent the first few weeks in Chicago with Mr. Polovchak's sister and her husband before moving to an apartment on the northwest side of Chicago with Mr. Polovchak's 24-year-old nephew, Walter Polovchak (cousin Walter).

Although both parents apparently began working in Chicago, they decided, after a few months, to return to the Ukraine. Natalie decided that she did not want to return with her parents, and Walter, although initially undecided, determined that he, too, wanted to remain in this country. Mr. Polovchak did not challenge his daughter's decision; however, he was adamantly opposed to allowing Walter to remain in this country. Apparently there was considerable tension between cousin Walter and the Polovchaks, who believed that the cousin was encouraging their son to remain in this country.

Cousin Walter secured another apartment and began moving, apparently on July 12. He and Natalie had had a conversation prior to the move, and it was decided that Natalie would move with her cousin. Walter also told his cousin that he would be joining in the move. The parents were apparently aware of some of these arrangements because on Saturday night, July 12, there was a heated family argument during which Mr. Polovchak, who was quite upset, demanded to know why Natalie was taking his son away.

The next morning, pursuant to a prearrangement, cousin Walter met Natalie and Walter a block or two from the parents' apartment and the three went to church. After lunch, they returned to a point near the parents' apartment, and, while the two Walters waited there, Natalie went alone to the apartment to get some of her belongings. She and her father argued about Walter, and the father followed her to the bus stop. Walter and his cousin apparently saw the father approaching and left. Later that day, Natalie joined her brother and cousin at the latter's apartment, where the three spent the night.

The following day, July 14, Natalie, her brother and cousin, and two adult friends of cousin Walter's went to the parents' apartment with two vehicles. The parents were at work, but as Natalie and Walter began gathering their belongings, their mother arrived. She attempted to

learn where they were taking her son but was rebuffed. Her son, speaking to her in Ukrainian, said something to the effect that she should not be concerned. Natalie and Walter spent the next four days at their cousin's apartment, and while no one informed the parents of their whereabouts, it is clear from the record that the Polovchaks knew that their children were together and with cousin Walter but did not know where his apartment was located. Cousin Walter contacted his attorney (who later became counsel for Natalie and Walter) on July 14 or 15.

On July 18, Mr. Polovchak went to a Chicago police station with an interpreter to attempt to find his son. According to a report filed by Sergeant Leo Rojek, Mr. Polovchak stated that Natalie had enticed Walter to run away from home rather than return to the Ukraine, and she was hiding him in cousin Walter's apartment. After apparently receiving a telephone number for cousin Walter's place of employment, the police ascertained his home address; they subsequently went to the apartment, located Walter, and took him back to the station.

After arriving at the station, Walter was asked why he ran away from home. He responded that his father intended to return to the Ukraine, but that he wanted to stay in this country. The police then contacted the United States Immigration and Naturalization Service and the Department of State and were instructed by officials from the Department of State that Walter was not to be returned to his parents. The police also contacted a Cook County judge who recommended that Walter be detained overnight as a runaway and brought to juvenile court the following morning. At some point during the processing, Natalie and cousin Walter's attorney, whom the cousin had apparently retained to represent Walter and Natalie, arrived at the police station. Walter was processed as a minor in need of supervision and placed with his sister and their attorney at the latter's residence. Mr. Polovchak was told of the court date the following

morning and advised that he and his wife would be transported to the hearing by the police.

A petition for adjudication of wardship was subsequently filed by a police officer, alleging that Walter Polovchak, age 12, was "beyond the control of parents in that he did on/or about July 14, 1980 at 9:00 A.M. at Cook County, Illinois, absent himself from his home without the expressed consent of his parents, in violation of Chapter 37, Section 702—3a, Illinois Revised Statutes, 1979," and that it was in the best interests of the minor and the public that Walter be adjudged a ward of the court.

On July 19, Walter appeared in court with the retained attorney. Also present were an assistant State's Attorney, counsel for the subsequently appointed guardian *ad litem*, a representative of DCFS, a representative of the Immigration and Naturalization Service of the United States, several police officers, and the Polovchaks. The trial judge asked whether Walter was prepared to plead to the charge, and, after an off-the-record conference between the assistant State's Attorney and counsel for the guardian *ad litem*, the latter entered a denial on behalf of Walter. She also informed the court that she and the assistant State's Attorney had agreed to the appointment of a temporary custodian. The assistant State's Attorney advised the court that it was her understanding that the parents were not in agreement with the temporary custody arrangement.

The Polovchaks neither spoke nor understood English, they did not have an attorney, nor were they provided with counsel or a court-appointed interpreter. Walter's private attorney, who speaks Ukrainian, advised the court that there were Ukrainian-speaking people in the courtroom, and a woman, whose status is not disclosed by the record, volunteered to interpret for the parents. Through the interpreter, the trial judge ascertained that Walter had been away from home since July 14, and that the parents wanted to take him home with them. The

court informed the Polovchaks that Walter would be placed in the temporary custody of DCFS pending a social investigation by a probation officer and a full hearing to determine whether Walter was a minor in need of supervision and whether he would be removed or returned to the custody of his parents. The parents were also advised that they had the right to be represented by counsel and that they should return to court with their attorney on July 30. No evidence was taken at this hearing; despite the parents' opposition, an order said to be "by agreement" was entered appointing the Guardianship Administrator of DCFS temporary custodian. In addition, the following findings of fact were entered on a preprinted form: that probable cause existed to believe that Walter was a minor otherwise in need of supervision, and that Walter should be placed in custody, in a suitable place, pending a further hearing because it was a matter of immediate and urgent necessity for his protection, he had been away from home for five days, he had in open court stated that he would not remain with his parents if released, and on his own motion he requested the court to order protective detention.

A petition was subsequently filed seeking to have Natalie Polovchak adjudged a ward of the court. The allegations of this petition were virtually identical to those contained in the previous petition on behalf of her brother. The hearing that followed on both petitions extended over a two-day period. All parties were represented by counsel, and several interpreters were present.

At the outset of the July 30 adjudicatory hearing, the trial court denied a motion by counsel for the Polovchaks to vacate the temporary custody order of July 19 on the grounds that it was not in compliance with the Juvenile Court Act. Over the objection of opposing counsel, the attorneys for Natalie and Walter then entered admissions on behalf of their clients "to the charges that they [were] minors in need of supervision." All four mem-

bers of the Polovchak family, including Walter, subsequently testified through an interpreter. The court also heard testimony from cousin Walter, Sergeant Rojek, and two psychiatrists. The evidence indicated that Walter left his parents' home without their consent and stayed with his sister and cousin for the next few days in the cousin's apartment and that he was motivated in doing so by his desire to stay in this country rather than return to the Ukraine. While both Natalie and cousin Walter denied that either influenced Walter's decision, it is clear that Walter's cousin had told Walter that he would help him if Walter decided not to go back to the Ukraine with his parents; it is also undisputed that Natalie, cousin Walter and his two adult friends assisted him in removing his belongings from his parents' home. Walter testified that had his sister and cousin not assisted him or allowed him to stay with them, he would have still left his parents' apartment and gone somewhere else.

Both the State and the Polovchaks presented psychiatric testimony. The two psychiatrists, Dr. Ner Littner and Dr. Robert Bussell, neither of whom examined Walter, testified in response to hypothetical questions which essentially incorporated the salient facts of this case. Neither expert believed that Walter was beyond the control of his parents. In addition, Dr. Littner, the Polovchaks' witness, stated his opinion that Walter's behavior was an immature act of defiance and rebellion rather than an independent judgment, and that the assistance of Walter's sister and cousin provided his actions with an aura of respectability or gave Walter a rationalization for rebelling against his parents. Further he stated that Walter was not a runaway nor did he engage in the type of behavior common to a runaway, who would ordinarily be certain not to let his parents know where he was going. Dr. Littner believed that, had Walter not been assisted by his cousin and sister, he may have manifested his disagreement with his parents by locking himself into a room and refusing to come out. The psychiatrists disagreed on whether a 12-year-old boy had

the ability to make an independent judgment as to which country he preferred to live in; their opinions also differed on the extent of emotional harm that would result to Walter from a continued separation from his parents.

At the conclusion of the hearing on August 4, 1980, the trial court found both Natalie and Walter to be minors in need of supervision and also adjudicated them wards of the court. Thereafter, during a discussion of possible temporary dispositions, including Walter's return to his parents, the judge was told by the DCFS worker that Walter had threatened suicide if returned "home." The worker indicated she would have so testified under oath, but the trial court denied a request that she be sworn. While the State attempts to rely on the alleged suicidal threats, we believe the references thereto are too nebulous for that purpose. There had been no reference to such threats in the initial appearance before the court or during the adjudicatory hearing. The later reference was neither under oath nor subject to cross-examination, and Walter neither testified, nor was he asked, about the matter. It is not entirely clear whether "home" was understood by Walter as the apartment of his parents or the Ukraine. Finally, the court had already announced its decision before the worker, who apparently neither spoke nor understood Ukrainian, volunteered the information.

On November 5, the date scheduled for the dispositional hearing, the Polovchaks filed notices of appeal from the wardship adjudications and the temporary custody orders. Natalie is no longer a minor under our juvenile act, and she is not involved in this appeal.

The United States Attorney for the Northern District of Illinois, at the direction of the Attorney General of the United States, has filed a "suggestion of interest" in this court advising us that, on July 19, 1980, the district director of the Immigration and Naturalization Service, with the advice of the Department of State, granted Walter Polovchak's petition for asylum. Walter's status was subsequently changed to permanent resident alien. We are in-

formed that the Immigration and Naturalization Service has also entered a departure control order which prohibits the departure of Walter from the United States. While advising us that the United States has no direct interest in the legal issues presented concerning our State statute, the United States Attorney suggests that any decision regarding the final custody of Walter respect the supremacy of the obligations of the United States under the Refugee Act of 1980 (94 Stat. 109, 8 U.S.C. 1182 (1980)) and the international obligations of the United States under the United Nations Protocol Relating to the Status of Refugees. 19 U.S.T. 6224-29 (1968).

Both the State and Walter argue that the parents should have been estopped from taking an interlocutory appeal under our Rule 662. The appellate court denied the State's motion to dismiss the appeal on that ground, a decision with which we agree. It is unnecessary to lengthen this opinion by quoting or discussing the portions of the record which demonstrate that the charges that the appeal was "fraudulently" based, that the parents "deceived" the trial court or adopted dilatory tactics for the purpose of taking an appeal are unfounded. Suffice it to say that the delay between the date of the wardship adjudication and the dated scheduled for the dispositional hearing resulted from a number of factors, some of which were directly attributable to the State and the minors. Too, we do not doubt that the multiple litigation and controversy surrounding this case have also adversely affected what should otherwise have been a prompt determination regarding Walter's custody. In fact, on the date scheduled for the dispositional hearing, he had been removed from the custody of his parents for 3½ months. Under the circumstances of this case, where the parents, but not the minor, were contesting the adjudication of wardship and the determination that their son was a minor in need of supervision, and an order of disposition had not been entered within 90 days of the adjudication of wardship, we hold that the parents properly invoked our Rule 662 to appeal (73 Ill. 2d R. 622).

The stated purpose of our Juvenile Court Act "is to secure for each minor subject hereto such care and guidance, *preferably in his own home,* as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; *to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal* ***." (Emphasis added.) (Ill. Rev. Stat. 1979, ch. 37, par. 701-2(1); *People ex rel. Davis* v. *Vasquez* (1982), 92 Ill. 2d 132, 142-43.) Just as the Act severely limits the authority to hold a minor in custody (*People* v. *Woodruff* (1981), 88 Ill. 2d 10, 14), it quite clearly directs the court before whom the minor is brought to release the minor to the custody of his parents rather than prescribe detention or shelter care unless it is found that it "is a matter of immediate and urgent necessity for the protection of the minor or of the person or property of another, that he is likely to flee the jurisdiction of the court or that the minor was taken into custody under a warrant." Ill. Rev. Stat. 1979, ch. 37, pars. 703-4, 703-6.

While the original order removing Walter from the custody of his parents includes a finding that the order was a matter of immediate and urgent necessity for Walter's protection, evidence in the record simply does not support that finding. None of the witnesses present, the minor, the parents or anyone else able to give relevant testimony was examined. (Ill. Rev. Stat. 1979, ch. 37, pars. 703-6.) Nor did Walter state, as the findings would seem to indicate, that he would not remain with his parents if released. Indeed, it is clear from the later proceedings that Walter's obstinance stemmed not from his opposition to being reunited with his parents but rather from his desire not to return to the Ukraine, an unlikely possibility, had the court released him to his parents, in view of the interest manifested by the Federal agencies. The factual allegation in the petition was that Walter had been away from home for five days without the expressed consent of his parents. Whether the court was aware, at the initial hearing, of the

circumstances under which Walter left his parents' home or that he had been staying with his cousin and older sister, rather than at large in the city of Chicago, is also unclear since no one specifically advised the court; at least on the record, of these facts. It is, in our opinion, clear that, given the absence of evidence to support the finding required by statute, Walter should have been released to the custody of his parents, who were in the courtroom requesting permission to take their son home.

The statutory provision under which Walter was later adjudicated a minor in need of supervision then provided: "Those otherwise in need of supervision include (a) any minor under 18 years of age who is beyond the control of his parents, guardian or other custodian." (Ill. Rev. Stat. 1979, ch. 37, par. 702-3(a); the statute has since been amended by Public Act 82-969 (Minor Requiring Authoritative Intervention), approved Sept. 8, 1982, eff. Jan. 1, 1983). The Act requires that an adjudicatory hearing be held to determine whether the allegations of the petition are supported by a preponderance of the evidence. (Ill. Rev. Stat. 1979, ch. 37, par. 701-4.) The decision of the trial court at that hearing should not be disturbed on appeal unless it is against the manifest weight of the evidence. See *In re Brown* (1981), 86 Ill. 2d 147, 152; *In re Stilley* (1977), 66 Ill. 2d 515, 520.

While this court has not previously construed the phrase "beyond the control" of one's parents, and the legislature has not further defined or explained that term in the Act, we agree with the appellate court that it seems manifest that the legislature could not have intended that phrase to include an isolated act by a 12-year-old minor which poses no hazard to him or anyone else. Decisions in this court, while involving different issues, demonstrate that the initial determination that the minor was in need of supervision was predicated on the fact that he was incorrigible, a frequent runaway or his acts posed serious hazards to himself or others. (See *In re R.R.* (1982), 92 Ill. 2d 423 (minor tried to poison her mother and was beyond her

parents' control); *In re Baker* (1978), 71 Ill. 2d 480 (minor repeatedly ran away from home); *In re Sekeres* (1971), 48 Ill. 2d 431, *appeal dismissed* (1972), 404 U.S. 1008, 30 L. Ed. 2d 656, 92 S. Ct. 691 (minor frequently absented herself from home); *In re Presley* (1970), 47 Ill. 2d 50 (allegations in original petition seeking to adjudicate minor otherwise in need of supervision or neglected were that she had absented herself from home for long periods of time without parental consent and on a specific date was forced by her mother and stepfather to leave home); *cf. In re G.B.* (1981), 88 Ill. 2d 36, *cert denied* (1982.) ..... U.S. ....., 72 L. Ed. 2d 487, 102 S. Ct. 2041 (habitually truant minor); Ill. Rev. Stat. 1979, ch. 37, par. 702-3(b)); Pub. Act 82-969 (minor requiring authoritative intervention), eff. Jan. 1, 1983; see also *In re Snyder* (1975), 85 Wash. 2d 182, 532 P.2d 278 (evidence that minor was adamant about refusing to return home, had established a pattern of refusing to obey her parents, and, on two occasions, in effect, fled her home, was sufficient to support the finding of loss of parental power and control); *In re D.J.B.* (1971), 18 Cal. App. 3d 782, 96 Cal. Rptr. 146 (a finding that a minor is beyond the control of his parents may be predicated on a single act if sufficiently serious; evidence that minor left home without parental consent was not of such a nature as to be indicative of the loss of parental control); *In re Galvan* (La. App. 1980), 384 So. 2d 1000 (evidence that on two occasions minor left the home of his mother—the custodial parent—without consent and stayed with his father because his mother was planning to move the family to Texas or because he may have thought he would be sent to military school was insufficient to establish that the minor was habitually disobedient and was ungovernable by his mother or that he was a runaway child in need of supervision); *cf. In re Price* (N.Y. Fam. Ct. 1978), 94 Misc. 2d 345, 404 N.Y.S.2d 821.

Although the parties characterize the evidence differently and disagree as to its legal sufficiency, as the appellate court noted, no material facts were in dispute. With

the help of his sister and cousin, Walter, a 12-year-old boy, left his parents' home without their consent and spent the next few days with his older sister at his cousin's apartment. This occurred during a time of considerable family tension regarding the Polovchaks' decision to return to their homeland. Neither psychiatrist, testifying in response to hypothetical questions based on these and other relevant facts, believed that Walter was beyond the control of his parents. We believe the appellate court correctly concluded that the trial court's decision was against the manifest weight of the evidence. Walter's actions, which can hardly be characterized as those of a runaway, and posed no hazard to him or anyone else, simply do not establish that he was beyond parental control.

The State argues, alternatively, that this court should remand for another hearing because Walter was not given the opportunity to present evidence that he was in need of supervision. Because the court indicated that it was going to conduct a hearing to determine whether there was a factual basis for the earlier admission entered by Walter, the State argues that Walter was limited in presenting evidence. Too, the State complains that, believing that there need only have been evidence to establish a factual basis for the admission, it may have been misled concerning the amount of evidence it was required to produce, and should therefore have another opportunity. We cannot agree. The record shows that neither the State nor Walter was prevented from presenting any evidence relevant to the determination of whether Walter was beyond his parents' control. A full adjudicatory hearing was held; Michael, Anna, Natalie and Walter Polovchak, cousin Walter and several other witnesses testified; each witness was fully examined by all parties; and, as the appellate court stated, the record establishes that the State recognized its burden and proceeded accordingly.

We have been advised that Michael and Anna Polovchak have returned to the Ukraine. It is apparent, therefore, that Walter cannot immediately be returned to his parents,

even assuming the Federal orders prohibiting his departure from this country had not been entered. We, of course, have considered only the issues before us, and our holding that the evidence before the circuit court did not support its action is dispositive only of those proceedings. Considering that, so far as we are presently informed, Federal litigation regarding the asylum and departure orders is still pending in the United States courts, we believe the appropriate disposition of this case is to remand it to the circuit court of Cook County with directions that it retain jurisdiction of Walter and this cause pending the return of Walter's parents, or either of them, to this country, in which event Walter's custody shall be given to the returning parents or parent. In the event that neither Michael nor Anna Polovchak shall return, the circuit court shall proceed in the manner it deems best suited to Walter's needs.

In view of our disposition here, we need reach neither the constitutional challenges nor the issue of whether the adjudication of wardship was in the best interests of Walter or the public.

For the reasons stated the appellate court's judgment reversing the circuit court is affirmed, and the cause is remanded to the circuit court of Cook County with directions to proceed in accordance herewith.

Affirmed and remanded,
with directions.

APPENDIX B

ORDER OF THE ILLINOIS SUPREME COURT DENYING THE PETITION FOR REHEARING

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

September 30, 1983

Hon. Richard M. Daley
Cook County State's Attorney
Criminal Appeals Section, Rm. 574
Richard J. Daley Center
Chicago, IL 60602

Nos. 56552 — In the Interest of Walter Polovchak, a Minor
56572 (People State of Illinois, et al., appellants,
Cons. vs. Anna Polovchak, et al., appellees).
Appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court